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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1029

KENNECOTT COPPER CORPORATION, *Petitioner*,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kennecott Copper Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 28, 1975.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the slip opinion appears in the Appendix hereto.

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 28, 1975. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the provisions of the Clean Air Act, the Administrator of the Environmental Protection Agency may lawfully disapprove a State implementation plan and substitute his own Federal plan, on the ground that, although the State plan provides for the attainment and maintenance of the national ambient air quality standards, it does so by reliance on emission control strategies other than the one preferred by EPA.

STATUTORY PROVISIONS INVOLVED

Section 110(a)(1) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(1), requires each State "to adopt and submit to the Administrator * * * a plan for implementation, maintenance and enforcement of" every primary and secondary national ambient air quality standard within the State. Section 110(a)(2), 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), provides in pertinent part:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

* * *

STATEMENT OF THE CASE

One of the air pollutants for which the Administrator of the Environmental Protection Agency has established national primary and secondary ambient air quality standards pursuant to Section 109 of the Clean Air Act, as amended, 84 Stat. 1679, 42 U.S.C. 1857c-4, is the odorless, invisible gaseous substance, sulfur dioxide. Among those man-made processes that produce large volumes of this gas is the smelting of copper, which is generally derived from a sulfide ore. A major source of sulfur dioxide emissions in the State of Nevada is the copper smelter owned and operated by petitioner Kennecott Copper Corporation in the eastern portion of the State.

In accordance with Section 110 of the Act, 84 Stat. 1680, 42 U.S.C. 1857c-5, the State of Nevada adopted

an implementation plan for the control of sulfur dioxide emissions from Kennecott's smelter. This plan required Kennecott to employ control measures that would reduce stack emissions of sulfur dioxide by 60 percent of the sulfur contained in the input ore. Aided by enhanced atmospheric dispersion from a recently completed 750-foot smokestack, this emission reduction would enable the smelter to achieve compliance with national ambient air quality standards for sulfur dioxide on all but a few days of the year.

The days on which the 60-percent emission reduction would be insufficient are those on which unusual meteorological conditions prevent normal dispersion of sulfur dioxide, causing ground-level concentrations to exceed short-term standards. On such occasions, emissions must be reduced still further by curtailing production or varying operation of the smelter in some way, such as feeding it standby supplies of lower-sulfur ore. By means of a computerized monitoring system, the buildup of these adverse atmospheric conditions can be predicted with sufficient reliability to enable the smelter operator to take the steps necessary to avoid violating the short-term standards. The Nevada plan required Kennecott to install and implement such a system, sometimes referred to as a "supplementary control system" (or "intermittent control system").

The State of Nevada duly submitted its plan to EPA for approval pursuant to Section 110(a). On February 6, 1975, EPA announced that it was disapproving key portions of Nevada's plan, and it promulgated substitute provisions in their stead, 40 Fed. Reg. 5508, 5511. EPA did not question that the emission reductions provided for in the State plan would enable Kennecott to achieve compliance with applicable standards.

Indeed, EPA's plan was in most respects substantially the same as the State's plan; it required Kennecott to reduce stack emissions by 60 percent and to make further reductions through use of a supplementary control system whenever the short-term standards would otherwise be violated.

There was, however, one major difference between EPA's plan and Nevada's. EPA found the Nevada plan "unapprovable" because its strategy for achieving the national standards depended for the indefinite future on Kennecott's use of a tall stack and application of a supplementary control system. It is EPA's position that such measures may not be a permanent part of a State's control plan because they do not effect "constant emission reduction," which is EPA's "preferred strategy for attaining and maintaining the standards" (40 Fed. Reg. at 5510).[1] At the same time, EPA recognized that the application of "constant emission reduction" technology capable of achieving the national standards at Kennecott's smelter is not now "economically feasible" (*ibid.*).

EPA estimated that, to achieve the national standards *without* reliance on a tall stack and a supplementary control system, Kennecott would have to reduce stack emissions by some 86 percent. Accordingly, EPA's substitute plan added the requirements (a) that, at such time as suitable "constant emission reduction" equipment becomes available, it must be applied to Kennecott's smelter to reduce emissions by 86 percent, and (b) that Kennecott must pursue "a

[1] EPA's thesis is that, while tall stacks reduce ground-level concentrations, they do not of themselves reduce emissions; and, while supplementary control systems bring about temporary reductions in emissions, they do not do so continuously.

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research program to develop and apply" such equipment (40 Fed. Reg. at 5516). In the meantime, Kennecott would be permitted to operate exactly as it would have under the State plan, subject to EPA's approval and periodic review of its research and development program and the operation of its supplementary control system.

Because Kennecott's Nevada smelter is too marginal economically to justify the additional expenditures and open-ended commitments contemplated by EPA (see 40 Fed. Reg. at 5509), Kennecott sought judicial review of the agency's substitute plan. Within thirty days after promulgation of the regulations containing the Federal plan, Kennecott filed its petition for review of the Administrator's action in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 307(b)(1) of the Clean Air Act, 84 Stat. 1707, 42 U.S.C. 1857h-5(b)(1). The State of Nevada intervened in support of Kennecott's position. In its argument to the court, Kennecott contended that, where a State implementation plan provides for attainment and maintenance of the national standards, Section 110(a)(2) of the Act does not authorize the Administrator to disapprove the State's choice of emission control strategies.

On November 28, 1975, the Court of Appeals rendered its decision. The court concluded that Section 110(a) (2) (B) expresses a "preference" that, to the extent possible, air quality standards be met by "emission limitations." To qualify as an "emission limitation," the court felt, a control measure must effect *reductions* in emissions and must do so *continuously*. Finding that the tall stack and supplementary control system strategies do neither, the court held that a

State implementation plan cannot rely on those strategies to meet air quality standards when suitable "constant emission reduction" measures are or become available. On that basis, the court affirmed the Administrator's disapproval of the Nevada plan and his promulgation of a substitute Federal plan.

REASONS FOR GRANTING THE WRIT

This Court should exercise its discretionary jurisdiction to review the decision of the Court of Appeals in this case. The opinion below interprets a Federal statute in a manner directly conflicting with this Court's recent decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). Furthermore, the court below has decided an important issue of Federal law that should be finally resolved by this Court.

I. The Decision Below Is in Conflict with This Court's Recent Interpretation of the Clean Air Act.

The court below held that, although the Nevada implementation plan provides for the attainment and maintenance of applicable air quality standards, the Administrator may nevertheless disapprove that plan because he disagrees with the State's choice of emission control strategies. That holding is squarely in conflict with this Court's landmark decision, rendered only nine months ago, in *Train* v. *NRDC, supra.* In that case, on the basis of an exhaustive analysis of the language and legislative history of the Clean Air Act, the Court concluded that Section 110(a)(2) of the Act *mandates* the approval of any State plan that provides for the achievement of national standards and meets the minimum conditions laid down in Section 110.

The Court's opinion sets forth its interpretation of Section 110(a)(2) simply and forcefully:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies the section's other general requirements. [421 U.S. at 79; emphasis in original.]

Recognizing that one of these "other general requirements" is that a plan include "emission limitations" (Section 110(a)(2)(B)), the Court went on to declare:

> *The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations* if they are part of a plan which satisfies the standards of § 110(a)(2) * * *. Thus, *so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.* [*Ibid.;* emphasis supplied.]

This Court's interpretation of Section 110(a)(2) would be seriously undercut if the decision of the lower court is allowed to stand. In essence, what that court did was to construe the term "emission limitations" in such a way as to give the Administrator of EPA a substantial veto over the States' decisions as to control strategy. It held that, in requiring each State plan to include "emission limitations," Section 110(a)(2)(B) really meant "constant emission reduction" measures, and that a State plan must rely on such measures to the extent that EPA considers them "economically feasible." Since the lower court also endorsed EPA's narrow view as to what qualify as "constant emission

reduction" measures, its decision would hand EPA pervasive control over the States' choices of emission limitations.

The Court will search the lower court's opinion in vain for any explanation as to how either the Act or its legislative history justifies a holding that "emission limitations" are confined to measures that *reduce* emissions and that do so *continuously*. Such a restrictive definition is plainly inconsistent with this Court's description of "emission limitations" in *Train* v. *NRDC*, *supra*:

> "[E]mission limitations" * * * are *regulations of the composition of substances* emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and *which if enforced should result in ambient air which meets the national standards.* [421 U.S. at 78; emphasis supplied.]

Least of all can any support for the lower court's contrived definition be found by reference to any reputable dictionary or to "normal usage" (see 421 U.S. at 89).

The lower court's departure from this Court's interpretation of the Act is all the more egregious for its having uncritically embraced EPA's notions as to what measures constitute "constant emission reduction" measures. The court opined that neither a tall stack nor a supplementary control system "assures a reduction in the quantity of the pollutant eventually emitted" (Appendix, p. 12a, *infra*). This approach ignores the fact that, in the Nevada plan, those measures were an integral part of an emission control strategy that included a *continuous 60 percent reduction* in emissions (supplemented by additional reductions as

required), and that these reductions would assure compliance with applicable national standards. Thus, if Nevada's plan does not include "emission limitations" that produce "constant emission reductions," it is difficult to visualize one that would.

The lower court's construction of Section 110(a)(2) would frustrate the will of Congress as perceived by this Court in at least three important ways. *First,* as we have seen, it would give EPA dominion over the setting of emission limitations far beyond anything intended by the legislature. This Court stated in *Train* v. *NRDC, supra,* that EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met" (421 U.S. at 79). The decision of the lower court would promote EPA to the leading role in that vital process without the sanction of Congress.

Second, and by the same token, the lower court's interpretation would sharply diminish the discretion the States were given by the Act to decide what emission control strategies best meet their local needs. In *Train* v. *NRDC, supra,* this Court stated its belief that

> Congress, consistent with its declaration that, "Each State shall have the primary responsibility for assuring air quality" within its boundaries, § 107(a), left to the States considerable latitude in determining specifically how the standards would be met. [421 U.S. at 86-87.]

If all emission limitations must produce "constant emission reductions" (as defined by EPA), and if all implementation plans must rely on such measures to

the extent that EPA considers their use "feasible," and if other measures (such as tall stacks and supplementary control systems) on which EPA frowns may not be relied upon, then the States are left with precious little "latitude," indeed, in developing their own strategies for meeting air quality standards.

Third, the lower court's decision would write a technology-forcing policy into Section 110(a)(2) that was never intended by Congress. In *Train* v. *NRDC*, *supra*, this Court taxed the Fifth Circuit for having failed to consider "that so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments" (421 U.S. at 91). That precept could hardly be more literally applicable than it is to the present case. Although Nevada's control strategy would concededly result in the attainment and maintenance of national standards, Kennecott must nevertheless conduct an EPA-supervised research program to develop improved emission-control technology. Much as EPA may wish to impose such technology-forcing requirements, they find "no basis in the present Clean Air Act."

There is, in short, no way in which the decision of the court below can be reconciled with this Court's authoritative interpretation of Section 110(a)(2) in *Train* v. *NRDC*, *supra*. The Court should grant a writ of certiorari for the purpose of resolving this clear conflict.[2]

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[2] There is also a substantial conflict between the decision below and several decisions of other courts of appeals, one of which is now before this Court for review. The lower court's decision that State plans must rely on "constant emission reduction" measures to the extent "economically feasible" (see Appendix, p. 2a, *infra*)

II. The Court Below Decided an Important Issue of Federal Law that Should Be Finally Resolved by This Court.

The provision that the decision below interprets—Section 110(a)(2) of the Clean Air Act—is one of the most significant provisions of that important statute. In setting forth the minimal elements that a State implementation plan must include to gain Federal approval, Section 110(a)(2) plays a crucial part in defining the respective roles of State and Federal authorities in the common effort to achieve clean air. Regardless of whether the lower court's interpretation of that provision is correct, there can be no question that it alters the basic distribution of pollution-control responsibilities as between the State and Federal Governments. On that basis alone, the decision below should be reviewed by this Court.

Moreover, the decision of the court below has practical implications far transcending the particular facts of the present case. The court's holding that "constant emission reduction" measures must be used to the extent available—even where not needed to assure compliance with national standards—would, if gener-

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necessarily assumes that EPA will consider economic feasibility in deciding whether to approve a plan under Section 110(a). However, other courts have held that economic and technological feasibility are not proper factors for consideration at the approval/disapproval stage, *e.g.*, *Indiana & Mich. Elec. Co.* v. *EPA*, 509 F.2d 839, 844 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), and EPA has taken the position before this Court that "the mandatory wording of the statute indicates that feasibility considerations are irrelevant under Section 110(a)(2) * * *," Respondent's Brief, p. 16, in *Union Elec. Co.* v. *EPA*, No. 74-1542 (Oct. Term 1975); see also Petition for Writ of Certiorari in *EPA* v. *Duquesne Light Co.*, No. 75-736 (Oct. Term 1975).

ally applied, tremendously increase pollution-control costs for American industry, especially in the metal smelting and electric power sectors. EPA itself has acknowledged that the issue presented by this case is "one that will have broad national significance" (Respondent's Brief, p. 7, *Kennecott Copper Corp.* v. *Train,* 9th Cir. No. 75-1335).

Finally, the essential question presented here is one that is bound to recur until it is finally put to rest by this Court. It has already arisen in two other circuits, see *Natural Resources Defense Council, Inc.* v. *EPA,* 489 F.2d 390 (5th Cir. 1974), *reversed in part,* 421 U.S. 60 (1975); *Big Rivers Elec. Corp.* v. *EPA,* 523 F.2d 16 (6th Cir. 1975). Petitions for a writ of certiorari to review the latter decision have been filed by a group of private electric power utilities (No. 75-774, Oct. Term 1975) and by the Tennessee Valley Authority (No. 75-787, Oct. Term 1975) and are still pending before the Court. There is every reason to expect that further efforts will be made in still other circuits to obtain relief from EPA's "constant emission reduction" policy.

Thus, even if the lower court's decision were not in conflict with this Court's opinion in *Train* v. *NRDC, supra,* it would be one that this Court should review. It involves an issue that is important to the administration of a key Federal statute, an issue that has broad significance for American industry, an issue that will continue to arise until it is definitively resolved. The Court should grant a writ of certiorari to settle this question once and for all.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNECOTT COPPER CORPORATION, *Petitioner,* vs. RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *Respondent.*	No. 75-1335 OPINION

[November 28, 1975]

On Petition for Review of an Action of the Administrator of the Environmental Protection Agency

Before: TUTTLE,* KOELSCH, and BROWNING, Circuit Judges.

BROWNING, Circuit Judge:

Kennecott Copper Corporation[1] petitions for review of an order of the Environmental Protection Agency (EPA) rejecting a portion of the State of Nevada's implementation plan under the Clean Air Act[2] relating to control of sulfur dioxide (SO_2), and substituting provisions formulated by EPA. The problem arises from a single source of SO_2

* Honorable Elbert Parr Tuttle, Senior United States Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

[1] The State of Nevada intervened in support of Kennecott.

[2] 42 U.S.C. § 1857 et seq. Jurisdiction of this court is under 42 U.S.C. § 1857h-5(b)(1) (regarding petitions for review of orders of the administrator promulgating plans under § 1857c-5(c)).

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emissions in Nevada—Kennecott's copper smelter at McGill in White Pine County.[3]

EPA based its order upon an interpretation of the Clean Air Act which requires that national air quality standards be met by continuous emission limitations to the maximum extent possible, and that intermittent controls and dispersion systems be used only when continuous emission controls are not economically feasible. This court denied Kennecott's request for a temporary injunction against enforcement of the substitute plan promulgated by EPA but expedited Kennecott's appeal. We affirm EPA's order.

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[3] For those not acquainted with the copper smelters' problem of controlling sulfur dioxide emissions, a few facts will help put the matter in perspective[.] Most copper produced in the U.S. is obtained from sulfide ores. The average copper concentrate contains about one ton of sulfur for each ton of copper, and in the smelting process this sulfur is driven off, largely in the form of sulfur dioxide. Each ton of sulfur produces two tons of sulfur dioxide which is emitted in gas streams of varying concentrations.

Muth, *Origins and Current Status of Sulfur Oxide Emission Standards for Nonferrous Smelters, reprinted in Implementation of the Clean Air Act Amendments of 1970, Hearings before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works, 92d Cong., 2d Sess.*, at 553 (1972) [hereinafter cited as 1972 Oversight Hearings].

About 90% of the sulfur dioxide is captured by a smelter's gas collection system and is vented into the atmosphere through smokestacks. The remaining approximately 10% escapes the smelter as "fugitive emissions." *See* Brief of Petitioner Kennecott at 5 n.1.

Senator Eagleton explained the importance of sulfur oxide emissions from copper smelters as follows:

> In Clean Air Act implementation, the copper industry has a significant role. Smelters annually pour 4 million tons of sulfur oxide (SO_2) [sic] into the atmosphere. The SO_2 from copper smelters constitutes one-ninth of the total SO_2 problem with steam generators for electric power the largest source SO_2 pollution—20 million tons annually. SO_2 causes about $8.5 billion damages annually.

1972 Oversight Hearings, *supra* at 435.

I

Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4, requires EPA to promulgate national primary and second air quality standards.[4] Section 110 of the Act, 42 U.S.C. § 1857c-5, applicable to existing sources of pollutants such as Kennecott's McGill smelter,[5] provides that the states must devise plans to implement, maintain, and enforce these national standards. EPA must approve state implementation plans if they are adopted after reasonable notice and hearing, and meet other specified requirements. EPA must disapprove any state plan that does not comply with the statute, and propose and adopt a plan of its own. 42 U.S.C. § 1857c-5(c)(1).

EPA approved the provisions of Nevada's implementation plan relating to control strategy except those involving control of SO_2 at Kennecott's McGill smelter, the sole stationary source of this pollutant in the Nevada Intrastate Air Quality Control Region.[6] Nevada submitted an amended plan.[7] EPA rejected the state's amendments, and proposed,[8] and eventually adopted,[9] a plan of its own.

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[4] The "primary standard" fixed by EPA is that "requisite to protect the public health." 42 U.S.C. § 1857c-4(b)(1). The "secondary" standard "shall specify a level of air quality [which] is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [an] air pollutant in the ambient air." 42 U.S.C. § 1857c-4(b)(2).

[5] The principal question presented in this case would not arise if the McGill smelter were a proposed facility rather than an existing one. Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6, provides that a *new* source of pollutant emissions must utilize the best available technology to reduce emissions without regard to air quality standards.

[6] 37 Fed. Reg. 10879 (May 31, 1972).

[7] 39 Fed. Reg. 38104-05 (Oct. 29, 1974).

[8] *Id.*

[9] 40 Fed. Reg. 5511 (Feb. 6, 1975).

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The amended Nevada plan provided for a 60 percent reduction of SO_2 emissions from the McGill smelter by installation of a plant to convert SO_2 to sulfuric acid. When weather conditions are so adverse that the 60 percent reduction in emissions resulting from operation of the acid plant would not be sufficient to maintain national air quality standards, the Nevada plan provided for reducing the level of production at the smelter.

EPA rejected the Nevada plan on the ground that an 86 percent reduction of SO_2 emissions from the McGill smelter was required to achieve air quality standards. EPA recognized that it was not presently economically feasible to install an acid plant or other constant emission control that would reduce SO_2 emission from the McGill smelter more than the 60 percent contemplated by the Nevada plan. The EPA plan therefore provided that, as an interim measure, Kennecott might use continuous emission reduction technology capable of reducing emissions by 60 percent, together with such other controls (including reducing production and use of a tall stack) as might be needed to maintain national air standards.[10] However, EPA's plan also provided that, until full compliance with national air quality standards is achieved entirely by means of continuous emission reduction,[11] Kennecott must undertake a research program to improve continuous emission control technology,[12] and must adopt such improved technology as it becomes available for use at the McGill smelter on an economically feasible basis.[13]

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[10] 40 C.F.R. § 52.1475(e)(7); 40 Fed. Reg. 5515 (Feb. 6, 1975).

[11] 40 C.F.R. § 52.1475(e)(15); 40 Fed. Reg. 5517 (Feb. 6, 1975).

[12] 40 C.F.R. § 52.1475(e)(13) & (15)(i)(b); 40 Fed. Reg. 5516 & 5517 (Feb. 6, 1975).

[13] In the preamble to its Nevada SO_2 regulations EPA stated:

> [T]he selective use of Supplementary Control Systems (systems which limit pollutant emissions during periods when meteorological conditions are conducive to ground level con-

Kennecott's basic position is that EPA is not authorized to require continuous emission reduction techniques in preference to intermittent controls or other methods for dispersion, or dilution, of pollutants. Kennecott contends that EPA must approve a state implementation plan that provides for any combination of continuous emission controls and alternative control systems devised by the state, so long as the state plan will attain and maintain national air quality standards within the statutory time periods.

This view of the statute underlies Kennecott's opposition to EPA's requirement that Kennecott engage in research to develop and apply constant emission control technology.[14] It is also the principal source of Kennecott's

centrations in excess of the National Ambient Air Quality Standards) to attain and maintain the ambient standards is consistent with the Clean Air Act when the only alternatives are permanent production curtailment, shutdown, or delays in the attainment of the national standards. . . .

* * * * *

EPA will approve such measures as intermittent production curtailment and use of dispersion techniques, including tall stacks, as an addition to available constant control measures, until such time as the treatment of weak gas streams can be accomplished through reasonable retrofit control techniques. Evaluation of the availability of constant control techniques which may be developed in the future will be made using the same criteria as were used in developing these regulations. Namely, [Supplementary Control Systems] will continue to be allowed where permanent production curtailment, shutdown or delays in attainment of national standards are the only other alternatives.

40 Fed Reg. 5508, 5510 (Feb. 6, 1975).

[14] This is the only ground upon which Kennecott challenges EPA's requirement that Kennecott undertake a research program to develop improved continuous emission control technology and adopt such technology when it is economically practicable. Kennecott does not argue, for example, that even if EPA may require use of continuous emission reduction controls in preference to intermittent controls or controls that dilute pollutants, EPA is nonetheless limited to imposing requirements that are practicable

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objection to EPA's determination that an 86 percent reduction in SO_2 emissions from the McGill smelter is required to meet national air quality standards. EPA's calculation rests upon measurements made prior to the installation of a new 750-foot tall smokestack at McGill. Kennecott submitted data to EPA indicating that the new tall stack resulted in a 92 percent decrease in ground level SO_2 concentrations.[15] EPA refused permanent credit for this reduction because, in EPA's view, the statute requires use of continuous emission reduction technology, as opposed to dispersion techniques, whenever economically feasible.[16]

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in light of the state of the art, and of the economy, when the implementation plan is promulgated. Kennecott appears to concede that if EPA can require that continuous emission reduction controls be used so far as practicable, EPA may also impose reasonable conditions to assure the development and adoption of such controls in the future. Nor does Kennecott argue that the research effort required by EPA is an unreasonable one; nor could it, since the nature and scope of the program has yet to be defined.

[15] 40 Fed. Reg. 5509 (Feb. 6, 1975) (col. 3).

[16] EPA apparently allows full credit for the diluting effect of smokestacks in existence before the first implementation plans were filed in January 1972. For stacks built after that date, but before the decision in Natural Resources Defense Council, Inc. v. Train, 489 F.2d 390 (5th Cir. 1974), EPA allows credit for the effect of a stack no greater than two and a half times the height of the facility and nearby obstructions. *See* Air Programs Office, EPA, Region IV, Evaluation of the Georgia Control Strategy, June 21, 1974, revised Mar. 31, 1975, at 2-3; Brief of Respondent at 41-42. Kennecott was given credit for the dispersion effect of a stack two and a half times the height of its McGill smelter. The lawfulness of this allowance is not challenged and is not before us. We also need not consider whether EPA acted lawfully in allowing full credit for the actual dispersal effect of tall stacks built before the initial implementation plans were filed. The considerations that might justify these exceptions to the general requirement that emission reduction techniques be used so far as practicable are not applicable to Kennecott's new stack at McGill.

Kennecott also challenges EPA's calculation of the percentage reduction in emissions required at McGill because EPA used a

II

EPA bases the requirement of constant emission controls upon section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2)(B).[17] This subsection provides that EPA shall approve a state implemention plan if "it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures *as may be necessary* to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls; . . ." (emphasis added).

"linear rollback method" which EPA itself had labeled inappropriate in some circumstances. As we understand the record, the inadequacy acknowledged by EPA is that the method may not take account of higher levels of pollution that occur at ground points other than those at which monitoring stations are located. This deficiency favors the pollutor. Furthermore, meteorological data for air dispersion modeling is unavailable for McGill. Brief for Respondent at 43-44. The rollback method cannot be characterized as arbitrary or capricious in light of existing scientific knowledge. Texas v. EPA, 499 F.2d 289, 301 (5th Cir. 1974). *See* Air Quality & Stationary Source Emission Control, Report by the Commission on Natural Resources, National Academy of Sciences, National Academy of Engineering, Natural Research Council, prepared for Sen. Comm. on Public Works, Sen. Doc. 94-4, 94th Cong., 1st Sess., at 242-45 (1975) [hereinafter cited as *Air Quality Report*].

[17] EPA also argues that the policy stated in § 101(b)(1) of the Act, 42 U.S.C. § 1857(b)(1), "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," authorizes EPA to restrict the use of intermittent controls with respect to SO_2 because of the potentially dangerous effects of aerosol sulfuric acid and sulfates, the end products of atmospheric SO_2 reactions even at SO_2 concentration levels below those permitted by national air quality standards. The dangers and uncertainties are outlined in *Environmental Protection Agency, Health Consequences of Sulfur Oxides: A Report from CHESS*, 1970-1971, at 18 & 20 (May 1974); *Air Quality Report*, *supra* note 14, at XVII-XVIII, 532-33. It is unnecessary to consider this possible alternative source of authority.

EPA reads the phrase "as may be necessary" as modifying only "such other measures," and not "emission limitations." In EPA's view, measures other than emission limitations are therefore permissible only if "necessary" to achieve applicable air quality standards; such "other measures" are not "necessary" if economically feasible emission limitation technology is available.

EPA supports its interpretation of section 1857c-5 (a)(2)(B) by references to the language and legislative history of the Clean Air Act Amendments of 1970. EPA relies upon the fact that an option to utilize intermittent controls or tall stacks carries the potential for evasion of the intent of Congress that emission limitations be included in implementation plans. EPA invokes the policy of nondegradation of the quality of the nation's air, implied from the Act.[18] EPA also draws support from the Supreme Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and from the provisions and legislative history of the Energy Supply and Environmental Coordination Act of 1974.

The Courts of Appeals for the Fifth and Sixth Circuits have adopted the interpretation of section 1857c-5 (a)(2)(B) urged by EPA. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390 (5th Cir. 1974), *reversed in part on other grounds sub nom., Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); *Texas* v. *EPA*, 499 F.2d 289, 311 (5th Cir. 1974); and *Big Rivers Electric Corp.* v. *EPA*, — F.2d — (6th Cir. 1975).

In *Natural Resources Defense Council*, the Fifth Circuit held that EPA may approve tall stack dispersion techniques in a state implementation plan "only (1) if it

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[18] The nondegradation policy requires that existing air quality be maintained even if degradation would not reduce the quality of the air below national standards. Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 408 (5th Cir. 1974). This court has recognized that the Clean Air Act intends such a policy. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 913 (9th Cir. 1974).

is demonstrated that emission limitation regulations included in the plan are sufficient *standing alone*, without the dispersion strategy, to attain the standards; or (2) if it is demonstrated that emission limitation sufficient to meet the standard is unachievable or infeasible, and that the state has adopted regulations which will attain the maximum degree of emission limitation achievable." 489 F.2d at 410 (emphasis in original).[19] We agree, in general, with the Fifth Circuit's analysis (489 F.2d at 403-09) of the history and contents of the Clean Air Act Amendments of 1970 leading to this conclusion.[20]

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[19] Prior to the Fifth Circuit's decision in *Natural Resources Defense Council*, EPA vacillated in its interpretation of the statute "[i]n the face of strong industry and Administration pressure." Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, 4 Ecology L.Q. 441, 457-58 (1975). Thereafter EPA consistently urged this construction, as it has in this case.

[20] Kennecott's attempt to distinguish the Fifth Circuit decision on the ground that the Georgia plan relied entirely upon dispersion techniques is unavailing; the Georgia plan, like that of Nevada, included the use of substantial emission reduction measures. 489 F.2d at 409.

Kennecott contends that the Fifth Circuit erred in reading the words "emission limitations" in § 1857c-5(a)(2)(B) to exclude emission dispersion and intermittent controls. Any other reading would render the words "other measures" surplusage. The Fifth Circuit's reading also best serves the congressional purpose to protect and enhance the quality of the nation's air. A summary of the 1970 amendments presented to the Senate by Senator Muskie distinguishes between emission limitations and "interim control measures." 116 Cong. Rec. 42384 (1970) (col. 3). Senator Muskie later expressed the view that emission reductions are required by the Act. 119 Cong. Rec. S 10941 (daily ed. June 12, 1973). William Ruckelshaus, EPA's first Administrator, indicated that "emission limitations" meant emission reductions. 1972 Oversight Hearings, *supra* note 3, at 265, 266.

Despite Kennecott's contrary arguments, we think the Fifth Circuit properly viewed the provisions §§ 1857c-6, 1857c-7, and 1857c-6(d), as supportive of a construction of § 1857c-5(a)(2)(B) reflecting a preference for continuous emission reductions. These provisions do not point unerringly to that result, of course, but

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In *Big River Electric Corp.*, the Sixth Circuit extended the Fifth Circuit's decision to intermittent emission con-

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the supporting inferences the Fifth Circuit drew from them are justified.

We do not attach the same significance the Fifth Circuit does to the use of the words "emission standard or limitation" in the statement of the authorized subject matter of citizen enforcement actions in § 1857h-2(a)(1). It may be argued (as the Fifth Circuit does) that since citizen enforcement actions are limited to emission limitations, Congress must have intended that such limitations be used whenever possible; but it may also be argued (as Kennecott does) that Congress must have intended the term "emission limitations" to include all types of controls. Both arguments assume that the term has the same meaning in § 1857c-5(a)(2)(B) as it has in § 1857h-2(a)(1). However, if the overall purpose of Congress would be better served by construing the term to include intermittent controls and tall stacks in § 1857h-2(a)(1) and to exclude them in § 1857c-5(a)(2)(B), there is no reason this reading cannot be adopted. Bailey v. United States, 360 F.2d 113, 116 (9th Cir. 1966); Grand Lodge of Int'l Ass'n of Machinists v. King, 335 F.2d 340, 344 (9th Cir. 1964). The use of "other measures" in § 1857c-5(a)(2)(B) and its omission in § 1857h-2(a)(1) supports such a construction. Senator Muskie, who clearly thought § 1857c-5(a)(2)(B) expressed a preference for emission reduction (120 Cong. Rec. S 10409 (daily ed. June 12, 1974), also thought a private citizen could sue to enforce provisions requiring intermittent controls. *Id.*

Kennecott's argument that use of a tall stack reduces ground level concentrations, or "dilutes" the pollutant and therefore is not inconsistent with a policy of nondegradation of air quality, ignores the undeniable fact that a tall stack does nothing to reduce emissions because it introduces all of the pollutant into the atmosphere. *See* 1972 Oversight Hearings, *supra*, note 3, at 638 (explanation of tall stacks by Mr. Crawford).

Kennecott admits that a "Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970" (*see* 116 Cong. Rec. 42384 (Dec. 18, 1970)) submitted to the Senate by Senator Muskie "seem[s] to reflect a view that all sources should be subject to emission limitations." Petitioner's Brief at 39. This conceded, it is not circular (as Kennecott suggests) to argue that § 1857c-5(a)(2)(B) must be interpreted to prefer emission limitations in order to prevent evasion of the intent of Congress, since state plans might otherwise rely wholly on less expensive intermittent controls and dispersion techniques to achieve air quality standards.

trol systems, holding that section 1857c-5(a)(2)(B) authorizes EPA to reject state plans providing for the use of intermittent emission control systems without a showing that constant emission controls are unavailable.[21] The Sixth Circuit based its conclusion upon the Fifth Circuit's analysis of the Clean Air Act Amendments of 1970, and upon the Supreme Court's discussion of section 1857c-5-(a)(2)(B) in *Train* v. *Natural Resources Defense Council*. *Train* parses section 1857c-5(a)(2)(B) as EPA's interpretation suggests (421 U.S. at 67), and adopts the position that a state plan must include provisions regulating the composition of substances emitted from a given source. 421 U.S. at 78. The Sixth Circuit noted that since composition means "kind and amount," *Train* recognizes that a state plan must limit the amount of a pollutant. — F.2d at —.

We agree with the Sixth Circuit that *Train* adds significant support to EPA's interpretation of section 1857c-5-(a)(2)(B) as expressing a preference for emission limitations.[22] Intermittent control systems (such as those re-

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[21] The Fifth Circuit stated in dicta that intermittent control systems were dispersion techniques subject to interdictions similar to those imposed on tall stacks. 489 F.2d at 394 n.2.

[22] Kennecott argues EPA cannot require Kennecott to develop and adopt improved methods of emission reduction in view of the Supreme Court's statement in *Train* that "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." 421 U.S. at 91. The Supreme Court was referring to modification of source-by-source emission limitations fixed by the state. EPA must approve such modifications so long as the state plan as a whole provides for a mix of emission limitations from all sources sufficient to meet national air quality standards. The *Train* holding is that EPA may not raise the emission limitation fixed by the state for a particular source to force technological improvement as to that source so long as the emission limitations set by the state for all sources are sufficient to meet national air quality standards. The Supreme Court was not ad-

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stricting production, or utilizing less polluting fuels, during periods of adverse weather) do limit the amount of pollutant emitted while such controls are being applied. However, the reliability and enforceability of such controls is questionable; they may not be implemented when they are in fact needed.[23] Moreover, there is no assurance that temporary reductions in emissions resulting from such controls will not be balanced, or even exceeded, by an increase in the amount of pollutant emitted when weather conditions improve and production is increased to make up for prior losses, or more polluting fuels are again used. Thus, intermittent controls, like tall stacks, may only disperse the pollutant rather than reduce it. Tall smokestacks disperse a pollutant through greater quantities of air; intermittent control systems disperse a pollutant through longer periods of time. Neither assures a reduction in the quantity of the pollutant eventually emitted.[24] Under section 1857c-5-

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dressing the question presented in this case; that is, whether EPA may seek to force development of technology to the extent necessary to enable national standards to be met by emission limitation controls, rather than by other measures.

[23] *See* 37 Fed. Reg. 15095 (July 27, 1972); 38 Fed. Reg. 25698 (Sept. 14, 1973). *See also* 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (remarks by Senator Muskie).

[24] As an EPA staff paper stated (Cong. Rec. June 12, 1973) (daily ed. at S 10948):

> Depending on the circumstances, [an intermittent control system] may or may not reduce the average long-term emissions. If plant operation is curtailed during poor dispersion conditions, then it may be increased during good conditions to make up for the lost production. Average emissions would be about the same with or without [an intermittent control system] for this situation. If clean fuel is used to reduce emissions during poor dispersion conditions, then average emissions will be reduced somewhat. If fuel with higher sulfur content is used during good conditions, then average emissions could be greater with [an intermittent control system]. It must be concluded, therefore that although [an intermittent control system] employs temporary emission limitation, the long-range control method is that of taking advantage of good dispersion rather than emission reduction.

(a)(2)(B), EPA may require that assurance. We therefore agree with the Sixth Circuit that EPA acted within its authority in refusing to accept intermittent controls as adequate compliance with the statute.

Kennecott presses one argument, based upon the 1970 amendments, not addressed by either circuit. Section 1857c-5(a)(2)(B) is applicable to existing sources of pollutants; section 1857c-6(b)(1)(B) governs new sources. Congress intended the standard applicable to the latter to be the more stringent. Kennecott argues that EPA's interpretation of section 1857c-5(a)(2)(B) would make the new source and existing source standards the same. Kennecott is mistaken. The new source standard requires "the degree of emission limitation achievable through the application of the best system of emission reduction" *without regard to air quality standards.* 42 U.S.C. § 1857c-6(a)(1). In contrast, existing sources, under EPA's view of section 1857c-5(a)(2)(B), need only reduce emissions to the extent necessary to comply with air quality standards. Moreover, existing sources, as opposed to new sources, need adopt only such systems of emission reduction as are economically feasible, so long as interim compliance with air quality standards may be achieved by "other measures." These differences are real. The record discloses that technology capable of reducing SO_2 emissions by 80 percent is available and is now installed at two Kennecott smelters. Such technology has not been required at McGill only because the required investment would be uneconomic at that smelter. *See* note 13.

III

Congress again amended the Clean Air Act in 1974. The Energy Supply and Environmental Coordination Act of 1974 added a new section 119 to the Act, 42 U.S.C. § 1857c-10. The provisions of this amendment assume that section 1857c-5(a)(2)(B) has the meaning attributed to it by the Fifth and Sixth Circuits and by EPA. The legislative history adds further significant support to this interpretation.

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The 1974 Amendments were a response to the 1973 oil embargo and resulting energy crisis. They provide, among other things, for temporary suspension of emission limitations where fuels necessary to compliance become unavailable, or a plant burning oil or gas converts to coal.

A predecessor to the 1974 Amendments was adopted during the first session of the 93d Congress, but was vetoed.[25] The legislative history of the aborted statute throws light on the proper construction of section 1857c-5(a)(2)(B). As it passed the House, the statute contained a provision (originating in the so-called Murphy Amendments) implying that the Clean Air Act did not require emission limitations, and permitting the permanent use of intermittent controls at certain emission sources.[26] This provision did

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[25] 10 Wkly Comp. of Pres. Doc. 289 (1974) (Veto of S. 2589).

[26] Murphy Amendments to H.R. 11450, § 201 (particularly proposed § 119(a)(2)(A)(iii) & (B)(i) of the Clean Air Act): *Compare* 119 Cong. Rec. H 11460 (daily ed. Dec. 14, 1973) *with id.* H 11230 (daily ed. Dec. 12, 1973).

Prior to adoption of the Murphy Amendments the proposed statute provided that the Administrator of EPA could temporarily suspend any stationary source fuel or emission limitation "if the Administrator finds—

. . .

> (iii) that such person has been placed on a schedule which provides for the use of methods which the Administrator determines will assure continuing compliance *with the stationary source fuel or emission limitation* as soon as practicable (but no later than June 30, 1979), which schedule shall include increments of progress toward compliance with such limitation by such date.
>
> (B)(i) Any schedule under subparagraph (A) (iii) shall include a date by which a contractual obligation shall be entered into for an emission reduction system. . . ."

119 Cong. Rec. H 11228 (daily ed. Dec. 12, 1973) (emphasis added).

Congressman Murphy's amendment modified this provision to read as follows:

> (iii) that such person has been placed on a schedule which provides for the use of methods which the Administrator de-

not survive the Conference Committee. As enacted, the Conference substitute permitted use of alternative or intermittent controls only by pollution sources that converted to combustion of coal, and then only under such conditions as "would require incremental steps toward compliance by utilization of low sulfur coal or coal by-products, or by continuous emission reduction systems." [27] The 1973 legis-

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termines will assure continuing compliance with *a national primary ambient air quality standard* as soon as practicable (but no later than June 30, 1979), which schedule shall include increments of progress toward compliance with such standard by such date.

(B)(i) Any schedule under subparagraph (A)(iii) shall include, *if necessary to meet a national primary air quality standard*, a date by which a contractual obligation shall be entered into for an emission reduction system. . . .

119 Cong. Rec. H 11460 (daily ed. Dec. 14, 1973) (emphasis added).

Congressman Murphy declared that "[n]othing in section 110 of the Clean Air Act mandates the use of any particular method of achieving air quality, such as scrubbers or low sulfur fuel." *Id.* at H 11231 (daily ed. Dec. 12, 1973). These views were shared by Congressman Jones of Alabama, *id.* at H 11214, and Congressman Nelsen, *id.* at H 11231. *But see* note 34 *infra*. In passing the House, the Murphy Amendment survived a counter amendment by Congressman Symington who recognized the implications of Congressman Murphy's proposal. 119 Cong. Rec. H 11394-95 (daily ed. Dec. 14, 1973).

[27] The Report of the Conference Committee states (Conf. Rep., S. Rep. No. 93-663, 93d Cong., 1st Sess. 83-84 (1973)):

> The House-passed bill would have permitted the use of so-called intermittent or alternative control strategies as a means of meeting ambient air quality standards if such strategies were determined by the Administrator to be reliable and enforceable. This permission would have applied to both existing sources not affected directly by the energy emergency and sources required to convert to coal under the emergency legislation.
>
> The Senate bill would have permitted revision of existing implementation plans to require use of continuous emission

lation assumed the correctness of EPA's construction of section 1857c-5(a)(2)(B).

The same pattern was repeated with respect to the bill adopted in the next session of the 93d Congress and signed by the President—again Congress assumed that the Clean Air Act is to be construed as requiring the use of continuous emission reduction systems if available, and again Congress rejected an affirmative effort to modify the statute to alter this construction. In March 1974 Russell E. Train, Administrator of EPA, transmitted a proposed bill to the Speaker of the House of Representatives which, in pertinent part, was the same in substance as the statute eventually adopted.[28] Mr. Train also transmitted two proposals advanced by other agencies of the Executive branch which, he wrote, "I do not support." One of these proposals would have rejected the nondegradation policy, collaterally

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reduction systems on any fuel-burning stationary sources affected by shortages of fuels, suspensions or conversions.

The conference agreement does not include either of the foregoing broad provisions. Instead, the conferees decided to limit the application of this provision to those sources which convert to combustion of coal as a result of the energy emergency. The conference substitute requires these converting sources to come into compliance with all plan requirements by 1979 (or 1980, if a postponement is obtained under section 110(f)) in accordance with a schedule which meets requirements of regulations of EPA. These requirements would require incremental steps toward compliance by utilization of low sulfur coal or coal by-products, or by continuous emission reduction systems to permit the combustion of high sulfur coal (or coal with high ash content) in compliance with such plan requirements.

[28] Letter dated Mar. 22, 1974, from Russell E. Train, Administrator of EPA, to Hon. Carl T. Albert, Speaker of the House of Representatives, attached to H.R. Rep. No. 93-1013, 2 U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess., at 3298 (1974). The Administration proposal appears at 4 BNA Env. Rptr. 2004-09 (1974) (current developments).

relevant here.[29] The other, directly relevant, would have amended section 1857c-5 expressly to bar the interpretation of subsection (a)(2)(B) adopted by the Fifth and Sixth Circuits and EPA, and to require the interpretation urged by Kennecott. The proposed bill would have added a new subsection to section 1857c-5 providing that nothing in that section was to be construed "to preclude use of alternative or intermittent control measures" which are reliable and enforceable and "will permit attainment and maintenance of the national ambient air quality standards."[30]

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[29] This proposal read:

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SIGNIFICANT DETERIORATION

Section 101 (b) (1) of the Clean Air Act is amended to read as follows:

"(1) to protect and enhance the quality of the Nation's air resources by establishing, achieving, and maintaining national ambient air quality standards, standards of performance for new stationary sources, and national emission standards for hazardous air pollutants so as to promote the public health and welfare and the productive capacity of the Nation, but nothing in this Act is intended to require or authorize the establishment by the Administrator of standards more stringent than primary and secondary ambient air quality standards;".

4 BNA Env. Rptr. 2010 (1974) (current developments).

[30] The proposal read:

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

INTERMITTENT OR ALTERNATIVE CONTROL MEASURES

Section 110 of the Clean Air Act is amended by adding subsection (h) which reads as follows:

"(h) Nothing in this section shall be construed to preclude use of alternative or intermittent control measures

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Mr. Train described the Administration's proposed bill as a victory over the two proposals favored by other executive agencies, which, he said, would "significantly weaken the Clean Air Act." He pointed out that these two proposals were submitted to Congress by the Administration only as issues to be considered, not as recommended changes. He noted that the proposal regarding intermittent controls, rejected by the Administration, was intended "to allow the use of intermittent control strategies as a permanent method for achieving compliance with stationary source emission standards." Mr. Train reaffirmed EPA's contrary position, stating, "As in the past, EPA will contend that the intermittent controls can be used only as an expedient, temporary control measure."[31]

EPA's position prevailed in Congress as it had within the Executive branch. The 1974 Amendments did not include the proposal approving general permanent use of intermittent controls to achieve national air quality standards,[32] or the proposal rejecting the policy of nondegradation. Intermittent controls were allowed only in carefully limited situations, and then only temporarily. Plants converting from oil or natural gas to coal might obtain an extension of compliance dates but only on condition that

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which the Administrator determines are reliable and enforceable and which he determines will permit attainment and maintenance of the national ambient air quality standards."

4 BNA Env. Rptr. 2010 (1974) (current developments).

[31] 4 BNA Env. Rptr. 1927 (1974) (current developments).

[32] In addition to the bill set out in note 30, Congress had before it a proposal offered by Congressman Nelsen (H.R. 13464) to amend 42 U.S.C. § 1857c-5(a)(2)(B) to provide that intermittent controls were acceptable as permanent alternatives to emission limitations. 120 Cong. Rec. H 1780, E 1376-78 (daily ed. Mar. 13, 1974). The bill died in committee.

they enter into binding contracts for a long term supply of coal that would enable them to meet emission requirements, or contract for continuous emission reduction systems necessary to enable them to achieve the required degree of emission reduction. EPA was empowered to impose such "interim requirements" as were "reasonable and practicable," but the required degree of emission reduction was to be achieved no later than a date certain set by the statute. 42 U.S.C. § 1857c-10(c)(2)(B) & (C). The required degree of emission limitation was fixed by reference to the state implementation plan applicable to the particular plant, but no one suggested that the statutory scheme might be frustrated because such a plan might seek to attain air quality standards by means other than emission reduction. On the contrary, Congress clearly understood that existing law required that air quality standards be achieved by emission reduction, and that other control measures were to be employed only temporarily.

Thus, in the course of presenting the Conference Report on the 1974 Amendments to the Senate, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and manager of the bill in the Senate, pointed out that "intermittent control strategies are permitted as an interim measure applicable to coal conversion" if EPA determined they were enforceable.[33] After expressing his personal doubt as to the enforceability of intermittent controls, Senator Muskie said:

> It is these doubts that lead me to underscore the fact that no one should view limited application of enforceable strategies related to this legislation as a precedent for future legislation *or as a reinterpretation of the requirements of the existing law which bar the appli-*

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[33] 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (1st col.) (emphasis added).

cation of intermittent control strategies as a substitute for emission limitations.[34]

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[34] 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (3d col.) (emphasis added). *See also* 120 Cong. Rec. S 8014 (daily ed. May 14, 1974).

The statement of Senator Baker, ranking minority member of the subcommittee, in support of the Conference Report, reflects the same understanding that emission limitations must be met by continuous reduction systems (120 Cong. Rec. S 10426 (daily ed. June 12, 1974) (1st col.)):

> I am concerned about the conference report provision that powerplants unable to obtain sufficient low sulfur coal or coal alternatives to meet emission limitations applicable under the law must undertake to obtain continuous emission reduction systems which are capable of meeting these limitations by 1979 while burning high sulfur coal. Although the term "continuous emission reduction system" is broad enough to encompass a broad range of technology, I foresee the possibility that certain specific solutions to the problem of sulfur oxide emissions might receive undue emphasis. For this reason, I want to emphasize that the term is meant to indicate any technology involving advanced techniques of combustion of coal—such as the fluidized-bed process—or after-treatment of combustion gases—for example flue gas desulfurization, better known as scrubber technology.

Senator Baker's statement echoes the view of John Sawhill, a subsequent Administrator of the Federal Energy Office, stated in a May 20, 1974, letter to Chairman Jennings Randolph of the Senate Public Works Committee:

> Specifically, we are concerned with the provisions of section 119(b)(2)(B) that require that plants scheduled to convert must be committed to a compliance schedule that provides a date by which the source must enter into contracts for low sulfur coal or scrubbers. This provision is coupled with section 119(b)(2)(C) that requires plants granted suspensions to come into compliance with emission regulations in a state implementation plan that are in effect on the date of enactment of these amendments.
>
> The requirement concerning contracts for low sulfur fuel or scrubbers would effectively preclude the use of intermittent control systems as an alternative method for achieving compliance. If the Administration's proposal to permit use of intermittent control systems, contained in our March 22

These legislative materials offer convincing evidence that the 93d Congress interpreted the 1970 Amendments to the Clean Air Act to require that air quality standards must be met by continuous emission reduction controls so far as possible.[35] The 1974 Amendments confirm this reading

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amendments to the Clean Air Act, is adopted, this section of H.R. 14368 would have to be amended to conform with it.

120 Cong. Rec. S 10414 (daily ed. June 12, 1974). (Both the Federal Energy Office and EPA claimed to represent the Administration, despite their inconsistent position on whether to permit permanent use of intermittent controls. The Energy Office's proposal was, however, only an alternative.)

Congressman Nelsen had earlier supported the Murphy Amendments, *see* note 26, and had introduced legislation to amend 42 U.S.C. § 1857c-5(a)(2)(B) to permit intermittent controls, *see* note 32. He noted that the "total impact of [new section 119] and the Clean Air Act provisions is to lock in the technology of scrubber systems . . . ." 120 Cong. Rec. H 5002 (daily ed. June 11, 1974). Congressman Nelsen nonetheless voted for the bill because Congress was committed to reexamination of his concerns regarding intermittent controls. *Id. See also* 120 Cong. Rec. S 8018 (daily ed. May 14, 1974) (comments by Senator Randolph) ("[Section 119] would clarify EPA's authority to impose interim requirements that both protect air quality and insure appropriate efforts are taken to secure continuous emission control systems or conforming fuels"). Senator Randolph mentioned the Fifth Circuit's *Natural Resources Defense Council* decision, and was critical only of that portion relating to the granting of variances.

[35] Kennecott's entire response to these materials is a footnote suggestion that the 1974 Act and its legislative history "must be construed in the context of the oil shortage it was intended to deal with, which gave rise to the necessity of permitting the EPA to *impose* [intermittent control] strategies upon states against their wishes and in violation of their state emission limitations *despite* the Clean Air Act's command that states be permitted to opt for stricter emission limitations than would be required to meet national ambient air quality standards" (emphasis in original). Reply Brief of Petitioner Kennecott at 14 n.1.

Giving this circumstance full weight, it does not diminish the significance of the compelling showing that Congress interpreted 42 U.S.C. § 1857c-5(a)(2)(B) as EPA urges us to interpret it. *Accord Air Quality Report, supra* note 14, at 213.

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of the earlier statute by strong implication. In these circumstances, the rule that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight" is appropriately applied. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 669-70 (1st Cir. 1974); *cf. Rath Packing Co.* v. *Becker*, — F.2d —, — (9th Cir. 1975).

IV

Kennecott spent $4,000,000 to implement the Nevada plan, but suspended further construction on the $30,000,000 project pending completion of this review proceeding. Kennecott states that the McGill smelter will only support the expenditures required by the Nevada plan, and that the smelter must close if Kennecott is required, in addition, to conduct research to devise new constant control technology which would be economically feasible at McGill.

EPA's plan requires the same immediate capital outlay as the Nevada plan with which Kennecott has said it can comply. Contrary to Kennecott's contention, EPA's plan would not expose Kennecott to the risk that it would be required to make further capital investments for the installation of uneconomic continuous emission control systems in the future. As EPA has undertaken to assure Kennecott (*see* note 13), under EPA's interpretation of section 1857c-5(a)(2)(B), EPA could not compel Kennecott to install additional emission reduction systems at McGill unless it were economically feasible to do so.

The order of the Environmental Protection Agency is sustained.

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